The Music-Copyright Enforcers

By JOHN BOWE
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Few things can make Devon Baker cry.

There was the time her pet hamster, Herschel, died. There was the time she was run over by a car. Neither episode provoked tears. Not even close. And yet, on a recent Thursday, as Baker drove down Highway 60, about 55 miles northwest of Phoenix, she had to wonder, Is today one of those days when I’m gonna cry?

Baker, who has preternaturally white teeth, green eyes, soft brown hair and a friendly way that she’s the first to describe as “country,” was on her once-a-month, weeklong road trip. She’d flown to Phoenix to meet with bar and restaurant owners to discuss a rather straightforward business proposal. Off she went on her rounds each day, navigating with a special Microsoft Streets and Trips plan she prepared in advance, with 60 to 80 venues marked with dots, triangles or blue squares, according to size, dollar value and priority, wearing her company badge with photo ID, hoping for a little friendly discussion. Except it didn’t always work out so friendly.

Once, a venue owner exploded, kicked her off his property and told her, as she recalled, “to get the bleep outta here.” Another hissed at her that she was “nothing more than a vulture that flew over and came down and ate up all of the little people.” It wasn’t fun. It was just the sort of thing, in fact, that could bring Devon Baker to tears.

Baker, 30, is a licensing executive with Broadcast Music Incorporated, otherwise known as BMI. The firm is a P.R.O., or performing rights organization; P.R.O.’s license the music of the songwriters and music publishers they represent, collecting royalties whenever that music is played in a public setting. Which means that if you buy a CD by, say, Ryan Adams, or download one of his songs from iTunes, and play it at your family reunion, even if 500 people come, you owe nothing. But if you play it at a restaurant you own, then you must pay for the right to harness Adams’s creativity to earn money for yourself. Which leaves you with three choices: you can track down Ryan Adams, make a deal with him and pay him directly; you can pay a licensing fee to the P.R.O. that represents him — in this case, BMI; or you can ignore the issue altogether and hope not to get caught.
P.R.O.’s like BMI spend much of their energy negotiating licenses with the biggest users of music — radio stations, TV and cable networks, film studios, streaming Internet music sites and so on. But a significant portion of BMI’s business is to “educate” and charge — by phone and in person — the hundreds of thousands of businesses across America that don’t know or don’t care to know that they have to pay for the music they use. Besides the more obvious locales like bars and nightclubs, the list of such venues includes: funeral parlors, grocery stores, sports arenas, fitness centers, retirement homes — tens of thousands of businesses, playing a collective many billions of songs per year.

Most Americans have no problem with BMI charging for its music — except when they do. As Richard Conlon, a vice president at BMI in charge of new media, put it: “A few years back, we had Penn, Schoen and Berland, Hillary’s pollster guys, do a study. The idea was, go and find out what Americans really think about copyright. Do songwriters deserve to be paid? Absolutely! The numbers were enormously favorable — like, 85 percent. The poll asked, ‘If there was a party that wasn’t compensating songwriters, do you think that would be wrong?’ And the answer was, ‘Yes!’ So then, everything’s fine, right? Wrong. Because when it came time to ask people to part with their shekels, it was like: ‘Eww. You want me to pay?’ ”

The day I accompanied her on her rounds, Baker was four days into her trip, on her way to Coyote Flats Cafe and Bar in the hamlet of Aguila. As we drove along Highway 60, the sunlight glared, hawks circled and the temperature was 100 degrees. Saguaro cactuses stood 30, 40-feet tall, stiffly riding up the foothills like porcupine quills. Baker mused about a picture she found online while researching the business. It depicted Coyote Flats’s owner, Dorene Ross, posing with her husband, Jim, for The Arizona Republic. There they were standing behind the cafe counter, she with a .380 Firestorm, he with a 9-millimeter Smith and Wesson. The article was about the lengths they were willing to go to defend their business from local thieves. It wasn’t exactly auspicious, given the volatile nature of Baker’s client interactions.

There was, for example, the gentleman at a Kentucky RV resort who told her on the phone that he was going to come into her office and “spray her down” with a machine gun. Then there was the female punk-rock-club owner in Colorado who ripped up Baker’s licensing agreement, ordered her out of the club, followed her out the door, spit a huge goober on the paperwork and stuck it to Baker’s windshield.

Not every experience is awful, she pointed out. She once signed an adult-club licensing agreement on the dance floor, beneath the strippers’ poles — and the strippers themselves, as they danced; it couldn’t have been more pleasant. Not long ago, she visited a manager for a health care chain and walked out half an hour later after a congenial sit-down with a signed agreement and a check for five figures.

But it was tough going sometimes, and these positive experiences were all too rare. “I actually had a guy that I called the other day,” Baker told me, “and when I asked when he might be sending in his check, he said: ‘I don’t know, why don’t you call Obama? Ask him! He runs everything now.’ So, I put that in my notes, ‘Client referred me to president of United States.’ ” Then there was the colleague of Baker’s who got a letter saying, “Eat you-know-what and die.” When she replied to the client, she got another letter, asking, “What part of eat you-know-what and die don’t you understand?”

During her five years with BMI — on trips to Texas, Ohio, Florida, Washington — Baker has learned a lot: managers of adult clubs tend to be polite. People who run coffee shops tend to be difficult. Skating rinks are a pain — they have the longest outgoing messages in the world. Casinos owned by Indian tribes are tough. Every decision goes to the tribal council, and it can take forever. Arts and crafts festivals, forget it; creative types never have any money. (“You’d think they’d get it,” Baker said, “But . . . .”) The most important rule of the road, however, is never — Baker looked me in the eye — eat in the venue, even if they invite you. Because God only knows what they might put in your food.
Performing rights organizations in the United States came into being in 1914, when a group of musicians, including Victor Herbert, Jerome Kern, Irving Berlin and John Philip Sousa, founded the American Society of Composers, Authors and Publishers, otherwise known as ASCAP, the nation’s first P.R.O., in 1914. It was formed in response to a 1909 amendment to United States copyright law that explicitly provided for performance rights as opposed to mechanical rights (paid to a performer who plays a song, regardless of who wrote it) or sync rights (music synchronized to pictures). The law — and ASCAP — were given new force when Herbert, then a celebrity composer for Broadway, sued a New York restaurant called Shanley’s after hearing one of his compositions performed there. The case took a couple of years to wind through the courts, but in the end, Supreme Court Justice Oliver Wendell Holmes decided for Herbert. “If music did not pay, it would be given up,” Holmes wrote. “Whether it pays or not, the purpose of employing it is profit and that is enough.”

In 1939, radio broadcasters, irked at paying royalties set by ASCAP, which was then a monopoly, founded their own P.R.O., BMI. This they did by rounding up the many songwriters excluded from ASCAP’s umbrella: “race musicians,” toiling away in the déclassé genres of jazz, country, blues and, later, rock ’n’ roll. Today, BMI represents some 400,000 songwriters (ASCAP has 390,000, many of whom are from those formerly déclassé genres), including Willie Nelson, Dave Brubeck, Keith Urban, Lady Gaga, the Beach Boys, Taylor Swift, the Red Hot Chili Peppers, Café Tacuba, Kanye West, Shakira, Linkin Park, Mariah Carey, Sheryl Crow and Kid Rock. The songs and compositions written by BMI signatories number some seven million tunes — about half the music in America — and bring in close to a billion dollars per year, which is distributed to its artists in quarterly royalty checks. For antitrust reasons BMI operates (as does ASCAP) by consent decree from the Department of Justice. It is privately owned but chartered to operate as a not-for-profit, to guarantee the maximum possible return to its songwriters and publishers (in 2010, it retained 11.6 percent of royalties collected for administrative costs).

In the past, BMI had 14 regional offices around the country, with field agents reading local newspapers and scouring the land on foot and by car, ever on the lookout for new bars and restaurants or old ones that aren’t paying for their music. Now those offices are closed, and employees like Devon Baker do much of their work by phone from headquarters in Nashville. But with the Internet, it has never been easier to keep tabs on the nation’s businesses. Venues advertise online which nights they offer live music or karaoke; state governments post liquor-license and corporate registries that give the names and addresses of business owners.

Once contacted by BMI, owners are given a worksheet. Does their venue use a radio, CD players, karaoke machine? Do they feature live music? If so, how often? How many people can the venue legally hold? For smaller businesses with low capacity that don’t make much use of music, a license may be as little as $300 a year. For really big operators, the cost might be as much as $9,000 per location per year, the maximum BMI is permitted to charge a single customer. (The fees are distributed to artists based on what BMI calls “an appropriate surrogate” — local radio or TV — that reflects a sampling of bars and restaurants in the area.) All in all, the division Devon Baker works for, General Licensing, accounts for 11 percent of BMI’s revenue.

According to Conlon, the struggles that Devon Baker faces on the road are emblematic of the difficulties faced by P.R.O.’s as a whole. “The dance that happens between the salesperson and a reluctant nightclub owner,” he says, “is the same dance that happens all the way up the food chain, to the New York boardrooms of the biggest media companies in the world. Where the bar owner might have a shotgun and a dog and say, Beat it! Go away or I’ll shoot you in the head, the more sophisticated iteration is done with teams of lawyers, pitted against each other, quibbling over niceties of copyright law.” The battles can be fierce — and the outcome uncertain. When ASCAP sued Verizon, claiming it was owed additional royalties on ringtones for which Verizon had
already paid a licensing fee, it lost. But when Weigel Broadcasting Company challenged
the license rates for two local stations as excessive, they lost and had to pay BMI $1.4
million in back fees. “The arguments don’t change,” Conlon continued. “No one’s an
eager purchaser. People do believe in copyright. But the tensions in making that money
flow are universal and constant. They don’t want to pay!”

Devon Baker works alongside about 24 other licensing executives on the fifth floor of
an office in Nashville, where most of BMI’s 600 employees are based. It looks, at first
blush, like any province in cubicle land. Except the men are all in ties. Facial hair,
tattoos, but ties. It’s a throwback, a stipulation from a former president and C.E.O.,
Frances Preston, that all male BMI representatives respect the line between artists and
their representatives. Artists make music; BMI representatives handle money.

Collectively, Baker and her colleagues make about a million calls a year. Most of these
are repeats, a fact that gets at the firm’s peculiar, slow-boil form of suasion. Rather than
initiating legal action, BMI and other P.R.O.’s prefer a kill-them-with-patience approach
that can take dozens of phone calls, letters and as long as 10 years.

One afternoon, I sat with Baker at her cubicle. Besides pictures of her fiancé, Mike, and
her nieces, she also has a smiley-face chart. Her boss made it up for all the licensing
executives, to remind them that their moods and their tones will determine their success.
The chart is like a traffic light. There’s a green smiley face, a straight face in yellow, then
a face in red, frowning. “You never wanna be on the red,” Baker said.

Baker’s computer, which runs on proprietary software, dialed an adult club in Maryland.
BMI, she told me, had been pursuing the owner for four years. Over this time, he
claimed that the club had no cover charge, that his staff never put money in the jukebox
and that there was no drink minimum. “Which I guess we found is not the case,” Baker
said, smiling, referring to a part-time field agent who was unable to corroborate the
owner’s claims. Baker straightened her headset. “I hope we get him on the phone.”

He answered. Baker informed him that his previous excuses didn’t hold water. After
some squirming, he announced that from now on, he just wouldn’t use BMI’s music —
only ASCAP’s: he was going to remove every BMI song from every karaoke machine, CD
and iPod mix that would ever be played in his club. Right. Baker made a note to check
back. A few hours later the owner called to say he’d pay.

Next, she tried to track down a Utah restaurant owner who has never had the money —
he says — to pay for a license. Meanwhile, his business has grown from three restaurants
to seven. She then called a Mexican restaurant in Georgia. Very polite — but the owner
was not around. Because the owner was never around. Finally, she called a bar owner in
Massachusetts. He sounded down on his luck; he said he understood the idea of music
rights, and in fact, used to play in bands and even wrote a few songs himself. But
unfortunately, he had no money. Baker made a note to call back.

The excuses fell like rain. On the road, Baker’s client-management software offers her a
list of common excuses — 24 in all — to keep track of what she’s told. But in the end, she
knows it’s a game, a game she’s going to win. Because after all the phone calls, letters
and visits, she possesses a secret weapon: the law. Whether or not a music user believes
copyright infringement is a big deal, violators face fines of anywhere from $750 to
$150,000 per song. If after several years, a violator refuses to back down, Baker ups the
ante and sends what is known in-house as “the Larry Stevens letter,” named after one of
Baker’s bosses, informing them that their case is being referred to BMI’s lawyers. Most
but not all cases are settled out of court. That’s because in 51 years, BMI has never lost a
single case it has tried.

Being a BMI licensing exec is one of the hardest jobs a person can have, Mike O’Neill,
senior vice president of repertoire and licensing, told me. “It’s different from other
industries and sales situations,” O’Neill said. “Clients aren’t deciding whether to pay you
so you can send them your product. They’ve already got it.”
We have a hard time paying for music, says O'Neill, because most of us grew up listening to it on the radio. It was free then. Shouldn’t it be free now? Of course, music on the radio was, in fact, not free. Radio stations paid licensing fees to BMI and ASCAP and paid for those fees by airing commercials, which took up some 20 percent of airtime.

The Internet allows users to download tunes, often without paying for them, avoid annoying commercials and play a song whenever they wish. The ease with which music can be had has contributed enormously to the notion that it’s there for the taking. In 2008, 40 billion songs were downloaded illegally. It is estimated that 95 percent of music tracks are downloaded without payment to the artist or the music company that produced them. Peer-to-peer (P2P) file swapping of movies and music currently accounts for up to 80 percent of Internet traffic. Music sales among American record labels in 2010 are about 42 percent of what they were a decade ago. As an industry report from January of this year states, “A generation of young music fans is growing up with the expectation that music should be instantly available, with near-limitless choice and access and, of course, free.”

Many musicians have coped with downloading by focusing on touring. They have learned to consider their recorded output, formerly their bread and butter, as a form of promotion for live shows. But the rise of musical genres, like northern Brazil’s “tecno brega” (“cheesy techno”), which remixes and reworks popular songs, offers another, more direct challenge to who should be paid when music is recorded or performed. The producers give away their mixes, so there’s no copyright infringement, then make their money by staging dance parties, to which admission is charged. In the States, producers like Danger Mouse and Girl Talk have created mash-ups of marquee copyrighted material, like Beatles songs, then released them to the general public free, daring authorities to charge them.

Most well-known songwriters are reluctant to advocate publicly for copyright law, out of fear of alienating fans. Dolly Parton is not one of them. “Ain’t nobody got so much money they don’t want all the money that’s coming to them,” she said when I spoke to her recently. Rank-and-file songwriters, whose livelihood can depend desperately on their BMI royalties, are the most likely to express sentiments similar to Parton’s. One day, I visited a Los Angeles DJ and electronica composer named Alex Amato. Amato, as it happens, lives in a converted barn near Vine and Santa Monica that, he said, belonged to the filmmaker Kenneth Anger. Under the name Genuine Childs, Amato composes music with his twin brother, Anthony, which they’ve sold to reality shows like MTV’s “Real World” and “Road Rules.” They’ve also composed DVD menu page music for several big studio releases like “Scarface” and “The Bourne Identity.” It’s a rarefied niche, but Amato seems happy: his music reaches millions of listeners.

Amato also waits on tables and manages a restaurant near his house. His quarterly BMI checks, he insists, are the key to survival. “It’s like my magical Willy Wonka ticket,” he says. Creating music, Amato points out, costs money. It takes money to rent a space, buy equipment, run the equipment. How does music get made if everything suddenly becomes free?

“There are more people listening to music now than ever before,” he told me. “But because of this new kind of accessibility, people feel like they don’t have to pay. Why is that? Why does constructor Joe get to build a house, and he gets paid the same as before, but suddenly, there’s this judgment about this one way of earning a living?”

It is worth noting that during the years the recording industry lost nearly 60 percent of its income, BMI and its competitor ASCAP had steady increases in profits. BMI has done so by going after how people use music commercially, regardless of medium. As the president and chief executive of BMI, Del Bryant, likes to say, “You have to be in the future a little bit.”

In BMI’s case, this has meant leapfrogging from AM radio to FM, from movies to cable to digital radio to streaming to (once-illegal) downloading companies like Napster. (BMI
began working on a deal with Napster about streaming music even before it sorted out its legitimacy.) They also signed with Rhapsody, the online streaming site, when the company was in its infancy. The trick, says Bryant, is to understand the content world as an ecosystem. When a new player comes along, don’t kill it, make a deal with it. With each new medium, he says: “We made agreements that weren’t that heavily monetized, and not that heavily binding because we didn’t know if it’d be around for long or how it would evolve. They were place keepers, ways to get us working together. And they slowly solidified. It’s all a question of pricing. The system has to serve everyone’s purposes.”

Richard Conlon echoed what Del Bryant said. “We’re not about shutting things down.” he told me. “We’re about nurturing markets. We don’t want people NOT to use it. We know the market is fractionalizing. You wanna take our music and stream it and have electronic whatevers that play when you stick a chip into something or somebody? Go ahead! Do it! Just pay us!”

BMI is rosy about the future. According to Conlon, who spends a lot of time watching how 8-to-15-year-olds use technology, downloading is out, streaming is in. And guess what? Streaming pays — just like radio. Legally the climate is good too. In May, a federal court found LimeWire, one of the few remaining big free peer-to-peer file-sharing services, guilty of inducing copyright infringement. The company could be fined as much as a billion dollars.

While the rest of the content world worries that technology will be the end of content, P.R.O.’s are banking that technology will save it. BMI has developed a system called Blue Arrow that deploys the same technology as iPhone’s Shazam to identify music. (ASCAP uses a similar system called Mediaguide.) These systems can listen to Internet sites, as well as radio and TV stations around the world and identify, in two seconds, virtually any piece of music being played — not just American, but Turkish, Arabic, Chinese, Korean, Latin, Japanese and so on. The Blue Arrow database has a capacity of 500 terabytes (one thousand gigabytes each) of music, and can recognize eight million songs. About 3,000 new songs are added each day.

David DeBusk, who was vice president of business development when I met him this spring but has since left BMI, offered to show me how Blue Arrow works. An employee punched a few keys to find out which radio stations in Germany were playing “schlager music,” a bizarrely kitschy form of country pop. One tap of the keyboard, and we were listening live:

Oom pah pah, oom pah pah. We went on to display all stations, worldwide, playing Swedish death metal. Did I want to see which ones were playing compositions by the composer Milton Babbitt? How about radio stations in Laos?

In the old days, P.R.O.’s relied mainly on playlists from radio stations and queue sheets from TV networks to figure out which songs were broadcast each month. Queue sheets were quite precise, listing every song a station broadcast, but playlists were, at best, a sample, an attempt to track the bulk of what got played. With Blue Arrow, however, it is possible to count every song played by a representative sampling of 400 radio stations across the country. Under the old system, hit-makers tended to dominate the machinery of royalty collection and distribution. Now, the “long tail” can be more effectively monetized: writers with minor hits, older hits, songs played here and there.

When DeBusk and his team began to hear the world through Blue Arrow’s ears, one thing they noticed was the number of “nonsong performances.” Everyone knows that rap music relies on sampled music, some of which should be paid for and isn’t. What surprised DeBusk was how common it was for copyrighted bits of music to be used free in jingles, as station-identification ditties and background music. DeBusk pulled up a screen detailing a list of nonsongs with generic names like “Graceful Power” and “Happy Days.” Such compositions, he said, are known as “production music,” written for ads and station identifications or for TV documentaries, and then sold to music libraries. If producers are looking for something that, say, sounds like boogie woogie or bebop, they go to a music library, listen to a few samples and purchase one.
One click with Blue Arrow and we knew that “Happy Days” was broadcast at five different times that morning on networks in the Southeast. Another click determined that it was used in a commercial for Country Crock margarine. Yet another click located its source: a music library in Atlanta. A few more key punches, and you knew if the library got their fee.

It was an awesome (or chilling) glimpse into the future: a world where if it can be tracked — on TV, on YouTube, in China — it will be charged for. Lawrence Lessig, a Harvard law professor known for his stance against what he views as an overexpansion of copyright law, is not against BMI’s being paid for its fair share but worries about the slippery slope created by new technologies. “If technology creates efficient ways to charge commercial users of copyright, then that’s good,” he told me recently, “but what I fear is that we evolve into a permission culture, where every single use of music creates an obligation to pay. I wish the line could be as clear as commercial exploitation — you’re running a dance club, using it in a movie. The author ought to have the right to be paid for that. But I don’t think that that right should translate into the right to control whether my kid uses the music for a collage he makes for a class about his trip to Costa Rica!” Friends I talked to had a similar reaction. To a one, they said: “Jesus. Sounds like Big Brother.” When I mentioned this to DeBusk, he smiled ominously. “Yes. Well. We’re here to help.”

On the road, in Arizona, Devon Baker prepared to arrive in Aguila. More of an outpost than a town, Aguila comprised little more than a gas station, a bar catering to Mexican farmworkers, a small grocery store and a wind-and-sand-bitten motel. When Baker arrived at Coyote Flats, she forgot about the guns immediately. (For legal reasons, I was not allowed to witness the subsequent negotiation, but it was recounted to me later by both parties.) The bar was a big honky-tonk kind of a place, covered in graffiti, with pool tables and a cafe next door. The owner, Dorene Ross, was ready for Baker. Most venue owners, Baker says, are not. Ross, Baker told me, seemed nervous but sweet. She invited Baker to sit down.

Dorene Ross is 47. For the last three years, she has run Coyote Flats Cafe and Bar with her husband and a brother who works unpaid, just to keep busy. Their clientele runs mostly to “ropers” (rodeo gangs), “snowbirds” and tourists in the summer, driving cross-country. For the past 25 years, in Arizona and Alaska, where she lived until recently, Ross has worked as a bartender and cocktail waitress. Never, she says, did she ever hear anything about anyone paying a single dime for music rights. “I really didn’t know much about it at all. I never even thought about it.”

Last April 15 — tax day, she noted wryly — she got a letter from BMI. The letter explained how American copyright law works. It also included a worksheet, which encouraged Ross to indicate if she had karaoke machines, radios and televisions in the bar and how often she used them, how often she has live music and what her operation’s capacity is. Ross filled out the worksheet. This much for the TVs. This much for the CD player. This much for the karaoke machine. That much for the radio. She discovered her yearly license would come out to $865.

Ross said, “My husband was like, ‘Well, we ain’t paying that!’ ” She laughed. “Giving away money wasn’t right at the top of my priority list there.”

It’s not hard to understand why Ross, a small businesswoman operating in a rural area during a recession, was reluctant to take on another fixed cost. Her insurance runs $400 a month, her electricity $2,000, her mortgage $2,500. Payroll is $2,000 per week, property taxes are $2,500 per year and the liquor license is $585. Add on state and federal taxes and a health-department permit. “It’s making it hard for us little people. I’m barely making it as it is.” At her last liquor-board review, she heard that more than 200 restaurants in Maricopa County didn’t bother to renew their liquor licenses because of the economic downturn. Each month, Ross said, she was lucky to clear $2,000. But given her kidney problems and $600 a month of medication, she said, “I’m like one bill away from folding.”
She understood why musicians wanted their money, she said, but she didn’t feel too excited about paying her share. Besides, how did anyone know that the songwriters got the money? How did she know this wasn’t some scam?

When Devon Baker called to make an appointment, Ross was taken aback. She’d expected Baker to yell at her and say: “You’re late! You’ve had the paperwork for two months already!” Instead, Baker seemed pleasant. “If they’d sent some big dude in a trench coat, some mobster type guy,” Ross said, she might have resisted. Instead, here came Baker, all big smile and soft hair. “I wasn’t expecting some cute little gal from Tennessee with a Southern accent.”

Baker accepted Ross’s invitation and sat down in the booth with Ross and her pug, Frank. Out came the checkbook. “I could tell she was low on money,” Baker told me later. “I could tell it was hard for her to shell out the money. But I also know music helps her make money. Or she wouldn’t have it. She and I knew she was doing the right thing.”

Ross produced her paperwork. She’d already figured it out. $16 a week. She could handle it, she guessed. “I didn’t want to give her the money. But I knew I had to.”

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